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No. 92-1863

In the Supreme Court of the United States

OCTOBER TERM, 1993

LOUIS J. ALIOTA AND PAULETTE ALIOTA, PETITIONERS

v.

JACK D. GRAHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
BARBARA L. HERWIG
MALCOLM L. STEWART
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in stating that if the Attorney General certifies that a federal employee was acting within the scope of his employment, the federal district court may not remand to state court a tort action against that employee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A15-A36) is reported at 984 F.2d 1350. The opinion of the district court (Pet. App. A1-A14) is not reported.

JURISDICTION

The court of appeals entered its judgment on January 22, 1993, and it denied a petition for rehearing on February 18, 1993. Pet. App. A37-A38. The petition for a writ of certiorari was filed on May 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Court held in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. As a practical matter, the Westfall Act provides immunity to government employees acting within the scope of their employment by requiring that the United States be substituted as the defendant and that the suit proceed against the government under the Federal Tort Claims Act (FTCA), see 28 U.S.C. 2671 *et seq.* The Westfall Act states in relevant part:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively

> establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d). The remedy against the United States "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1).

As the quoted passage indicates, the Westfall Act provides that when the Attorney General or his designee certifies in a suit filed in state court that the employee has acted within the scope of his employment, the suit "shall be removed * * * at any time before trial" to federal court. 28 U.S.C. 2679(d)(2). Prior to the passage of the Westfall Act, the FTCA authorized a district court to remand a removed case if the court determined that the federal employee had not acted within the scope of his employment. See 28 U.S.C. 2679(b) and (d) (1982 & Supp. V 1987). The Westfall Act partially repealed that statutory remand authority by providing that the Attorney General's scope certification "shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2). The Act continues to vest the district court with the power to remand in cases in which the Attorney General does not issue a scope certification. See 28 U.S.C. 2679(d)(3).

2. From 1980 until 1989, petitioner Louis J. Aliota served as chief of the pharmacy at the Veterans Affairs Medical Center in Erie, Pennsylvania. In 1990, he and his wife, petitioner Paulette Aliota, filed suit in state court against five of Mr. Aliota's former co-workers, who are the private defendants (and respondents) in this case. Petitioners alleged that the defendants had made defamatory statements about

Mr. Aliota. The defendants filed a notice of removal to federal district court, and the United States Attorney for the Western District of Pennsylvania certified that the five had acted within the scope of their employment when they allegedly made the statements in question. The district court ordered that the United States be substituted as the sole defendant in the case. Petitioners moved to resubstitute the individual defendants, arguing that the alleged tortious acts had not been committed within the scope of their employment. Pet. App. A17-A18.

The district court ultimately granted petitioners' motion, concluding that the acts alleged did not fall within the scope of the defendants' employment. The court acknowledged that the defendants' duties included "[f]actual exchange of information" with persons outside the VA. Pet. App. A8. The court continued, however, that "[t]he allegations of this lawsuit do not state that the original defendant passed on *factual* information. This case is a defamation action! Therefore, we conclude the alleged conduct of the individual defendants was not conduct that they were employed to perform." *Id.* at A9. After concluding that the acts alleged were not within the scope of the defendants' employment, the court struck the substitution of the United States and ordered the case remanded to state court. *Id.* at A12-A13.

The court of appeals reversed. The court held that the resubstitution of the individual defendants was reviewable on appeal, Pet. App. A19-A23, and that the district court's disposition of the scope-of-employment issue "appears to have been based on legally erroneous premises," *id.* at A34. Specifically, the district court had "apparently reasoned that an employee's conduct cannot be within the scope of

employment if the employer instructed the employee not to engage in that conduct." *Ibid.* The court of appeals vacated the district court's decision and remanded "for a redetermination whether, in accordance with the procedures and standards we have set out, the originally named individual defendants were acting within the scope of their employment when they allegedly made defamatory statements." *Id.* at A36.

The court of appeals also held that, regardless of the district court's resolution of the scope of employment issue, the district court lacked authority to remand the case to state court after the United States Attorney's scope-of-employment certification. The court explained that

> when a tort suit against a federal employee is filed in state court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous. We believe that this conclusion is dictated by the plain language of 28 U.S.C. § 2679(d)(2)(1988) stating that the Attorney General's certification "shall *conclusively* establish scope of office or employment *for purposes of removal.*"

Pet. App. A27-A28 (emphasis added by court of appeals). The court further noted that if 28 U.S.C. 2679(d)(2) were interpreted to permit remand in this situation, the quoted language "would be essentially meaningless." Pet. App. A28.

DISCUSSION

Petitioners challenge the court of appeals' determination that once the Attorney General or his designee makes a scope-of-employment certification under the Westfall Act, a district court may not remand the case to state court, even if the district court disagrees with the scope certification and resubstitutes the individual defendant. Petitioners correctly note that this aspect of the court of appeals' decision conflicts with language in other court of appeals opinions. As we explain below, however, the case presents an inappropriate vehicle for this Court's resolution of the issue. Moreover, the court of appeals' holding is compelled by the plain language of the statute and is consistent with constitutional limitations on the jurisdiction of the federal courts. The petition should therefore be denied.

1. The court of appeals' decision in this case is inconsistent with language in *Nasuti* v. *Scannell*, 906 F.2d 802 (1st Cir. 1990). In *Nasuti*, the Attorney General had certified that the defendant was acting within the scope of his federal employment. The principal question in that case was whether the district court had authority to resubstitute the individual defendant and remand the case to state court, because an exception to the FTCA made relief against the United States unavailable. 906 F.2d at 810. The First Circuit ruled that the district court was required to decide the scope-of-employment issue itself, *ibid.*, and to dismiss the suit entirely if it determined that the scope certification was proper. *Id.* at 814. Accord *United States* v. *Smith*, 499 U.S. 160 (1991). The First Circuit also stated, however, that "[i]f the district court finds that Scannell was

acting *outside* the scope of his employment, it shall remand the case back to the state superior court." 906 F.2d at 814 (emphasis in original).

The court of appeals' decision in this case is also inconsistent with language in *Green* v. *Hill*, 968 F.2d 1098, modifying 954 F.2d 694 (11th Cir. 1992). The Eleventh Circuit addressed the consequences of a Westfall Act substitution in an assault and battery action, concluding:

> If the district court finds that the assault and battery occurred within the scope of Hill's employment, it must dismiss this case. If it finds that the acts occurred outside the scope of employment, it is within the district court's discretion to continue its jurisdiction over the case and adjudicate the controversy. On the other hand, the court may elect to remand the assault and battery issue to the state court.

968 F.2d at 1098-1099.

Neither the First Circuit nor the Eleventh Circuit devoted extensive analysis to the question presented here. In particular, neither court attempted to explain how a remand to state court in this setting could be reconciled with the Westfall Act's command that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2).[1]

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[1] Petitioners also contend that the decision below is in conflict with *Snodgrass* v. *United States*, 957 F.2d 482 (7th Cir. 1992), and *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 112 S. Ct. 62 (1991). That contention is incorrect. In *Snodgrass*, the United States Attorney *refused* to issue a scope certification, see 957 F.2d at 484; in that situation remand is

2. Although this Court may ultimately find it necessary to resolve the conflicting views on the issue presented here, the petition for a writ of certiorari in this case should be denied.

As an initial matter, this case currently is in an interlocutory posture. The court of appeals reversed the district court's determination that the individual defendants had not acted within the scope of their employment and remanded the case to the district court to redetermine that issue under the correct legal standards. See Pet. App. A22. If the district court concludes that the individual defendants were acting within the scope of their employment, the court will not reach the question whether a remand to state court is appropriate. If the district court instead disagrees with the scope certification and resubstitutes the individual defendants (and if petitioners are dissatisfied with the outcome of the ensuing trial), petitioners may renew their jurisdictional challenge on appeal and, if necessary, in a subsequent petition for a writ of certiorari. In either event, the case is not ripe for review by this Court. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see also *Virginia Military Institute* v. *United States*, No. 92-1213 (May 24, 1993) (opinion of Justice Scalia respecting the denial of the petition for a writ of certiorari).

The Court's usual practice of awaiting a final judgment in the lower courts is especially pertinent

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unquestionably appropriate. See 28 U.S.C. 2679(d)(3). In *S.J. & W.*, the language in the original panel opinion that authorized remand to state court was deleted in response to the government's rehearing petition. See 924 F.2d at 1555.

here, because petitioners did not give the court of appeals panel a full opportunity to consider the argument that they present in this Court. Petitioners principally contend that the court of appeals' interpretation of 28 U.S.C. 2679(d)(2) is inconsistent with constitutional limitations on the jurisdiction of the federal courts. See Pet. 4-8. That argument, however, was presented to the court of appeals only in the suggestion for rehearing en banc petitioners filed after the panel had issued its decision. Prior to the panel's decision, petitioners had argued that the district court's remand order was unreviewable—a contention that the court of appeals rejected and that petitioners do not press in this Court. Petitioners also relied on *Nasuti* in arguing that the district court had acted properly in remanding the case after it concluded that the scope certification was incorrect. Petitioners did not contend, however, that the Constitution would prohibit the district court from retaining jurisdiction after resubstituting the individual defendants. Nor did they cite *Mesa* v. *California*, 489 U.S. 121 (1989), the case on which they principally rely in their petition for certiorari. Because petitioners' constitutional argument was neither presented to nor addressed by the court of appeals, this Court should not consider it. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).[2]

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[2] See also, *e.g.*, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945) (Supreme Court ordinarily will not consider issue raised for the first time in rehearing petition filed in highest state court unless state court expressly decided the question).

Finally, the decision of the court of appeals is correct. The plain language of the Westfall Act requires that the case remain in district court once the Attorney General or his designee issues a scope certification. Section 2679(d)(2) states that upon the issuance of a scope certification by the Attorney General, a suit against an individual federal employee "shall be removed" to federal district court, and "the United States shall be substituted as the party defendant." Those provisions make clear that any request to resubstitute the individual defendants must be addressed to the federal rather than the state court.[3] But regardless of the disposition of such a request, the Westfall Act's additional provision that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal" prevents a remand to the state court. The last sentence of 2679(d)(2) would be superfluous if it did not mean what it says: the Attorney General's scope certification shall be the final word in determining whether the defendants are entitled to a federal forum.[4]

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[3] But see *Johnson* v. *Carter*, 983 F.2d 1316 (4th Cir. 1993) (en banc), petition for cert. pending, No. 92-1591 (filed Apr. 1, 1993) (holding that the Attorney General's certification is not subject to judicial review).

[4] This reading of Section 2679(d)(2) is supported by Section 2679(d)(3), which addresses the situation in which the Attorney General has refused to certify that the defendant was acting within the scope of his employment. The employee may contest the Attorney General's refusal to issue a scope certification, and the case may be removed to federal court for consideration of the scope-of-employment issue. Section 2679(d)(3) provides that "[i]f, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding

Article III of the Constitution does not prevent Congress from allowing a case such as this one to proceed in federal court, even if the district court rejects the Attorney General's scope certification. Petitioners' complaint alleges that federal employees committed a tort, and the Attorney General has determined that the employees are entitled to substitution under the Westfall Act, which extends substantive protections to federal employees. Thus, this case does not involve merely "a state law claim between two private citizens which does not implicate any law or interest * * * of the United States." Pet. 7. Congress's conferral of federal rights under the Westfall Act provides a constitutionally sufficient basis for federal jurisdiction, even if the federal court ultimately determines that substitution is not available to these particular defendants and that state law provides the rule of decision. See generally *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 491-497 (1983) (presence of foreign sovereign immunity issue furnishes constitutional basis for federal jurisdiction).[5]

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shall be remanded to the State court." The absence of a similar provision governing cases in which the district court disagrees with the Attorney General's scope certification further suggests that remand is impermissible in that context. See Pet. App. A28-A29.

[5] As this case illustrates, a district court's preliminary rejection of the scope certification usually will not definitively resolve the defendant's claim to immunity. In this instance, the district court rendered its decision on the scope-of-employment issue based on the allegations contained in petitioners' complaint. See Pet. App. A9. Even if the district court in this case adheres to that ruling on remand from the court of appeals, its decision would not foreclose the possibility of a

Petitioners' reliance on *Mesa* v. *California*, 489 U.S. 121 (1989), is misplaced. The Court noted in that case that the federal statute allowing removal of suits against federal officers acting "under color of such office" (28 U.S.C. 1442(a)) envisions removal only when the defendant asserts a colorable federal defense, 489 U.S. at 135, and the Court suggested that a statute permitting removal of *any* lawsuit filed against a federal employee could raise serious constitutional difficulties, *id.* at 136-139. The Westfall Act does not pose that potential difficulty. The Attorney General's scope certification under Section 2679(d)(2) establishes that the federal employee in question has a legitimate federal defense under the Westfall Act. To be sure, the district court may ultimately disagree with the Attorney General's certification. But the certification certainly establishes, at a minimum, that the defense is "colorable." By contrast, Congress has expressly provided for a remand in cases where *both* the Attorney General *and* the district court have determined that the individual defendant was not acting within the scope of his employment. 28 U.S.C. 2679(d)(3). See note 4, *supra*.

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different result following discovery or after trial. The court of appeals therefore properly required final disposition of that issue in the federal forum. Cf. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2040 (1993) ("the jurisdiction of the Court depends upon the state of things at the time of the action brought"); *Republic National Bank* v. *United States*, 113 S. Ct. 554, 559 (1992) (subject matter jurisdiction "survives a change in circumstances").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

BARBARA L. HERWIG
MALCOLM L. STEWART
Attorneys

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